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December 3, 1993

92-266
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DEC - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: Comments of TKR Cable Company in Support of
Continental Cablevision's Emergency Petition for
Reconsideration of "Questions and Answers" of November
10, 1993

Dear Mr. Caton:

Enclosed please find an original and nine copies of the
above-referenced matter. Kindly provide a copy to each
Commissioner. Should you have any questions regarding this
matter, please contact the undersigned counsel.

Very truly yours,


Susan R. Athari
Counsel for
TKR Cable Company

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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DEC -13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-266

In the Matter of)

Implementation of Sections)
of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

Rate Regulation)

**COMMENTS OF TKR CABLE COMPANY IN SUPPORT OF
CONTINENTAL CABLEVISION'S EMERGENCY PETITION FOR RECONSIDERATION
OF "QUESTIONS AND ANSWERS" OF NOVEMBER 10, 1993**

TKR Cable Company (hereinafter "TKR"), by and through its attorneys, respectfully submits these Comments in support of Continental Cablevision's (hereinafter "Continental") Emergency Petition For Reconsideration filed with the Federal Communications Commission (hereinafter "FCC" or "Commission") on November 15, 1993, regarding the FCC's adjustment of the GNP-PI figure for the third quarter of 1992 stated in Question No. 9 of the FCC's "Questions and Answers" issued on November 10, 1993. TKR Cable Company is a privately held multiple system operator which provides cable service through systems located in New Jersey, New York and Kentucky.

The announced change to the GNP-PI figure in Question No. 9 will have an adverse impact on TKR's operations. The FCC's announced revision fell two business days before cable operators, such as TKR, were required to submit their completed

Forms 393 to the Commission in response to subscriber complaints. TKR had already revised its rates, notified its subscribers and completed its Forms 393 for filing with the Commission on November 15, 1993 using the GNP-PI figure printed in block 123 of Form 393, Part II. The announced change causes the rates of every cable operator set in accordance with Form 393 to be unlawfully high and subjects cable operators to potential refund liability.

For the reasons more fully described below, TKR submits that the announced change: (1) constitutes an ex post facto rate adjustment and is impermissible; (2) violates the Administrative Procedure Act's requirement for notice and comment prior to the adoption of a new rule; (3) subjects cable operators to forfeitures and constitutes an unlawful "taking" without due process of law within the meaning of the Fifth Amendment; and (4) creates utter confusion in the rate regulation process.

I. Application of the Adjusted GNP-PI Figure Constitutes Ex Post Facto Rate Regulation and is Impermissible.

The announced change constitutes an ex post facto rate adjustment and violates the almost universal prohibition against retroactive application of rules or policies. The FCC's action invalidates the benchmark rates already established by the Commission. As a result, TKR's rates adjusted in accordance with the FCC's established benchmark and Form 393 will now be unlawfully high and could subject TKR to forfeitures.

Retroactive application of a newly announced rule or policy has almost never been permitted. Yakima Valley Cablevision v.

FCC, 794 F.2d 737 (D.C. Court of Appeals, 1986). Failure of an agency to consider alternatives before applying a new standard retroactively has led uniformly to reversal. See National Black Media Coalition v. FCC, 775 F.2d 342 (D.C. Cir. 1985); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). Detrimental reliance by a party on prior agency policy has also precluded an agency from applying new policy retroactively. New England Telephone and Telegraph Co. v. FCC, 826 F.2d 1101, 1109 (1987).

In this case, TKR detrimentally relied on the FCC's established benchmark rates and the inflation factor printed on the FCC's official Form 393 in adjusting its rates. Since the announced change has a negative impact on the permitted revenues going forward as of September 1, 1993 and subjects TKR to the prospect of refunds, applying the new figure retroactively constitutes an ex post facto rate adjustment and is impermissible.

II. The Adoption of the Adjusted Inflation Factor Violates the Notice and Comments Requirement of the APA.

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, requires that before an agency adopts substantive rules, the agency must provide notice and a period for public comment. Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658, 666-67 (D.C. Cir. 1978).

Since the GNP-PI figure replaces the figure stated on Form 393, it is intended to be part of the Commission's substantive rules with respect to rate regulation. Form 393 which cable

operators have used in adjusting their rates was the form approved by the GAO. Without GAO approval, the Commission has subsequently made a substantive change in Form 393. Simply announcing the new GNP-PI figure in the "Questions and Answers" is improper notice. Further, no period for public comment has been provided by the Commission. The Commission's failure to provide notice and comment is a violation of the APA and is invalid.

III. The Commission's Action Constitutes an Unlawful Taking Without Due Process of Law and is Unconstitutional.

The Fifth Amendment provides that property may not be "taken" for public benefit by the federal government without just compensation. "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking". Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985) (quoting Pennsylvania Coal Co. v Mahon, 260 U.S. 393 (1922)). The announced change by the Commission was made without sufficient notice and made after TKR completed its Forms 393 for filing. Subjecting TKR to potential forfeitures and loss of revenues constitutes an unlawful taking by the government without due process of law.

IV. Retroactive Application Of The New Figure Creates Confusion and Raises Costs Associated With The Rate Regulation Process.

Constant modifications in the FCC's rules cause utter confusion and increase administrative costs in the rate regulation process. The associated costs to cable operators are

astronomical, as they are required to pay anywhere from \$.50 to \$1.00 per subscriber for costs attributed to bill structuring and notifying subscribers of rate changes. Consumer inquiries skyrocket each time there is a change in billing, as they become frustrated with ascertaining what is a justifiable rate. Franchising authorities are consequently beleaguered as they try to verify compliance by cable operators with FCC rules and attempt to respond to consumer inquiries. Clearly, the chain effect resulting from constant changes in rate regulation creates chaos and is inequitable to cable operators, franchising authorities and the public who are diligently trying to understand and follow FCC rules.

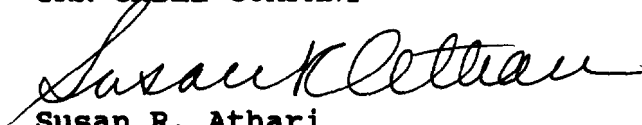
V. Conclusion.

In summary, forcing cable operators to implement the adjusted GNP-PI figure for the third quarter of 1992 constitutes ex post facto rate regulation and is impermissible. The announced change violates the notice and comment requirements of the Administrative Procedure Act. The application of the adjusted inflation factor constitutes an unlawful "taking" by the federal government without just compensation within the meaning of the Fifth Amendment. Moreover, the announced change creates total confusion regarding rate regulation requirements under the FCC rules for cable operators, franchising authorities and consumers. At the very least, the FCC should apply the adjusted inflation factor prospectively, rather than retroactively. Cable operators can then employ the new figure

when rates must be adjusted in the future. The Commission will find this result to be equitable for the cable industry and will benefit the public interest.

Respectfully submitted,

TKR CABLE COMPANY

A handwritten signature in cursive script, appearing to read "Susan R. Athari".

Susan R. Athari

Mark J. Palchick

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CERTIFICATE OF SERVICE

I, Marianne C. Lynch, certify that I have this 3rd day of December, 1993, sent by regular United States mail, postage prepaid, a copy of the foregoing "Comments of TKR Cable Company in Support of Continental Cablevision's Emergency Petition for Reconsideration of 'Questions and Answers' of November 10, 1993" to:

Reed Hundt, Chairman*
Federal Communications Commission
1919 M Street, NW, Room 814
Stop Code: 0101
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, NW, Room 802
Stop Code: 0106
Washington, D.C. 20554

Commissioner Andrew C. Barrett*
Federal Communications Commission
1919 M Street, NW, Room 826
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Washington, D.C. 20554

Commissioner Ervin S. Duggan*
Federal Communications Commission
1919 M Street, NW, Room 832
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By: 
Marianne C. Lynch

* Hand delivered